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No. 78-1248

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners,*

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents.*

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May, 1979

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OCTOBER TERM, 1978

No. 78-1248

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Pursuant to Rule 24(5) of the Rules of the Supreme Court, petitioners herewith submit this Supplemental Brief in Support of their Petition for a Writ of Certiorari in order to bring to the attention of this Court an important development that affords further support for granting the petition and eliminates the major reason advanced by the Solicitor General as the basis

for his opposition to the Court's grant of the writ. That development is the unanimous affirmance by the United States Court of Appeals for the Third Circuit, on April 30, 1978—after the Solicitor General filed his brief herein—of the order entered by the Delaware District Court permanently enjoining the disclosure contested in both the Delaware and District of Columbia actions. The Clerk has agreed to allow us to lodge photocopies of the forty-eight page Third Circuit opinion with this Court as an unprinted supplemental appendix.

In the Brief for the Federal Respondents in Opposition, the Solicitor General argued that the petition should be denied because the Third Circuit might vacate the Delaware District Court's injunction in light of this Court's recent decision in *Chrysler Corp.* v. *Brown,* 47 U.S.L.W. 4434 (April 18, 1979), and thereby eliminate "any possibility of inconsistent dispositions" (Sol. Br. in Opp. 5). This argument is no longer viable now that the Third Circuit has affirmed the Delaware injunction in its entirety, in an opinion that expressly takes *Chrysler* into account.

Significantly, except for this suggestion that the petition is somehow premature, the Solicitor General's brief serves only to reinforce the validity of the reasons we have advanced (Pet. 14-31) for granting the writ. The Solicitor General states that he "substantially agree[s] with petitioners' arguments on the merits" (Sol. Br. in Opp. 5). In particular, the Solicitor General agrees that the Court of Appeals for the District of Columbia Circuit erred in rejecting the manufacturers' argument that the requesters' action could not be maintained because "[f]ailure to violate a lawful judicial order simply cannot be 'improper' "

(Sol. Br. in Opp. 7) within the meaning of the FOIA, which, in the words of the statute, confers jurisdiction on a district court only "to order the production of any agency records improperly withheld," 5 U.S.C. § 552 (a)(4)(B). In addition, the Solicitor General states: "[W]e agree with petitioners' contention (Pet. 28-30) that the court of appeals erred in instructing the district court to adjudicate, at once, a controversy that is the subject of adjudication in another federal court," and that it "makes no sense" to do so (Sol. Br. in Opp. 7).

Such substantial agreement with our reasons for granting the writ should logically have led the Solicitor General to conclude that a grant of certiorari and summary reversal by this Court would be appropriate. His reluctance to do so seems to have been based on a failure to appreciate that this Court's recent holding in *Chrysler Corp.* v. *Brown, supra,* would not aid the Government's position in the appeal then pending before the Third Circuit, as has been subsequently made clear by that court's affirmance of the Delaware injunction.[1]

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[1] The Solicitor General apparently misunderstood the issue before the Third Circuit as involving the Delaware District Court's application of the Trade Secrets Act, 18 U.S.C. § 1905 (1976). *See* Sol. Br. in Opp. 5 & n.2. As the Third Circuit's affirmance confirms, the Delaware District Court relied exclusively upon Section 6(b)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b)(1) (1976), in permanently enjoining disclosure of the same documents that the private respondents herein seek to have released to them in their District of Columbia litigation. *See* op. 10-11.

In fact, far from supplying the Third Circuit with reason to vacate the Delaware injunction, this Court's holding in *Chrysler* was relied upon by the Third Circuit as validating the Delaware court's decision. *See* op. 9-10 & n.1; *see also* op. 19, 22, 39.

This perceived impediment to this Court's summary reversal of the Court of Appeals' decision has now been removed by the issuance of the Third Circuit's decision. As the Solicitor General points out, to insist on retrial in a second court of issues identical to those already decided by the Delaware court (and now the Third Circuit) in closely related litigation would "require the parties to engage in what we believe to be unnecessary and duplicative litigation" (Sol. Br. in Opp. 9). Further proceedings before the District of Columbia court would not only be a wholly unreasonable and needless imposition on the resources and time of the court and the parties, but the very concept of that court's considering on the merits the validity of the Delaware permanent injunction, now affirmed *in toto* by the Third Circuit, is unseemly and clearly improper. No further litigation is necessary to establish this proposition. The matter is ripe for decision by this Court.

The Brief for the Respondents Consumers Union of the United States, Inc., and Public Citizen's Health Research Group in Opposition—filed concurrently with the issuance of the Third Circuit's decision—fully recognizes the importance of the District of Columbia Circuit's decision, as well as the then-anticipated Third Circuit's decision (Resp. Br. in Opp. 8-9). The Third Circuit's decision not only affirms the permanent injunction of the Delaware court; it also holds (op. 16-17) that these respondents cannot complain under Rule 19 of the Federal Rules of Civil Procedure that they were not joined by the manufacturers as parties in Delaware because they deliberately refused to intervene in the district court litigation, even though they could have done so "without significant burden" (op. 16)—a fact

that respondents' brief in opposition, and especially its counter-question presented, carefully plays down (Resp. Br. in Opp. 2).[2]

For reasons fully set forth in the petition and supplemented herein, the petition for writ of certiorari should be granted and the case reviewed by this Court. Should the Court not deem the case worthy of full review, we urge that, in light of the Third Circuit's affirmance of the permanent injunction entered in the Delaware litigation, certiorari be granted, the judgment of the Court of Appeals vacated and the case remanded to that court with instructions to affirm the dismissal of the respondents' suit by the District of Columbia District Court.

If the Court is not wholly convinced of the appropriateness of granting certiorari at this time, we suggest that the Court refrain from acting on the petition to discover whether the Solicitor General, after full study of the Third Circuit's opinion on the merits, chooses to seek certiorari in that case.[3] The Court could

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[2] Respondents also make much of "their statutory choice of forum" (Resp. Br. in Opp. 9), totally ignoring that the manufacturers, as submitters of information, also have a statutory choice of forum under 28 U.S.C. § 1391(e) (1976) for actions they may bring under the Administrative Procedure Act to enjoin wrongful agency disclosure under the Freedom of Information Act (Pet. 22 & n.10). *See* Chrysler Corp. v. Brown, *supra*, 47 U.S.L.W. at 4444; GTE Sylvania, Inc. v. Consumer Product Safety Commission, 3d Cir. No. 78-1328, op. 9-10 & n.1.

[3] For example, the Solicitor General may seek certiorari on what he may perceive as a conflict with the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *United States Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978).

then consider the petitions for certiorari in these two closely related cases at the same time.

Respectfully submitted,

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